Decision No. R04-1543

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04R-510T

RULES RELATING TO THE REGULATION OF OPERATOR SERVICES FOR TELECOMMUNICATIONS SERVICE PROVIDERS AND TELEPHONE UTILITIES.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE ANTHONY M. MARQUEZ ADOPTING RULES

Mailed Date: December 28, 2004

I. STATEMENT

1. This docket concerns proposed amendments to the Rules Regulating Operator Services for Telecommunications Services Providers and Telephone Utilities, 4 *Code of Colorado Regulation* 723-18 (Operator Services Rules). The Commission initiated this rulemaking proceeding by Decision No. C04-1184 (Mailed Date of October 14, 2004), Notice of Proposed Rulemaking. As described in the Notice, the Commission, in this case, proposes to amend Appendix A to the Operator Services Rules, which sets forth the Benchmark Maximum Operator Services Rates, by increasing the benchmark rate for the Pay Telephone Charge from $.26 to $.50 per call.

2. The Notice explains that the Federal Communications Commission (FCC) recently modified the default rate of payphone compensation for dial-around calls, increasing that rate from $.24 to $.494 per call. S*ee* FCC's *Report and Order*.[1] As explained in the Notice,

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[1] *In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones,* Report and Order, FCC 04-182 (rel. August 12, 2004).

the Commission proposes to adopt a permanent rule increasing its benchmark Pay Telephone Charge (on Appendix A of the Operator Service Rules) to $.50 in light of the increased dial-around compensation adopted by the FCC.

3. Decision No. C04-1184 permitted interested persons to file written comments prior to hearing in this matter, and the following companies filed such comments: MCI, Inc. (MCI); Eschelon Telecom, Inc. (Eschelon); the Colorado Payphone Association (CPA); and Qwest Corporation (Qwest).

4. In accordance with Decision No. C04-1184, the Administrative Law Judge (ALJ), on December 10, 2004, convened the hearing in this case to allow interested persons to submit oral or written comment on the proposed rule. Only Qwest submitted additional oral comment.

5. Pursuant to § 40-6-109, C.R.S., the record of this proceeding and this recommended decision are transmitted to the Commission.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

6. For the reasons discussed below, this Order recommends amending Appendix A to the Operator Service Rules by increasing the benchmark rate for the Pay Telephone Charge to $.52 (from $.26).

7. As noted above, this case concerns compensation for dial-around calls from payphones. "Dial-around" calls are calls from a payphone in which a caller makes a coinless call using a carrier other than the payphone's presubscribed long distance carrier. The Notice (paragraph 2) describes two kinds of dial-around calls: The first is where a caller uses a code to access the caller's preferred long distance carrier to complete the call (*e.g.,* 1-800-XXX-XXXX or 10-10-XXX); the second, known as "toll-free" calling, is where a business pays a long distance carrier for a toll-free number that its customers can use to contact that business without

themselves incurring toll charges. "Dial-around compensation" is a payment (per call) *made by an interexchange carrier (IXC)*[2] *to a payphone service provider* (*i.e.,* the owner of the payphone) for each completed dial-around call.

8. The comments by MCI and Eschelon correctly clarify that the Commission, in this proceeding, is not setting the actual dial-around charge, the dial-around charge being the compensation to be paid to payphone service providers (PSPs) for dial-around calls. Instead, the per call dial-around compensation is set by the FCC in its implementation of § 276[3] of the Communications Act of 1934, as amended. The pertinent provision in § 276 directs the FCC to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone…."[4] In this proceeding, the Commission is setting the end-user charge to permit IXCs to recover from end-users the costs of dial-around compensation paid to PSPs.

9. The Pay Telephone Charge in the Commission's Operator Service Rules (Appendix A) is intended to allow IXCs to recover their costs for dial-around compensation paid to PSPs. Prior to the emergency rule adopted in Decision No. C04-1116 (Mailed Date of September 24, 2004), the benchmark Pay Telephone Charge was set at $.26 per call. The comments point out that the $.26 charge was based, in part, upon the prior dial-around compensation rate established by the FCC of $.24. Therefore, the Commission-established rate allowed IXCs $.02 per call for recovery of their costs for administering the dial-around compensation program (*i.e.,* costs over-and-above the per call compensation paid to the PSP).

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[2] According to the FCC, the term "IXC", in this context, includes a local exchange carrier when the local exchange carrier provides a toll-free subscriber service or service accessed by access codes. *Report and Order*, footnote 83.

[3] 47 U.S.C. § 276.

[4] 47 U.S.C. § 276(b)(1)(A).

10. In the *Report and Order* the FCC increased the dial-around compensation rate to \$.494 per call. The FCC pointed out that conditions in the payphone industry had changed significantly since it set the rate at \$.24. Notably, the FCC observed that its method of calculating dial-around compensation spreads the costs of payphones, which are largely fixed, over a measure of the number of payphone calls.[5] And since it last set the compensation rate at \$.24, the volume of payphone calls had declined dramatically. Necessarily, the FCC's methodology of spreading largely fixed payphone costs over a significantly declining volume of calls meant that the per call dial-around compensation would increase significantly—as it did.[6]

11. Given the substantial increase in the dial-around compensation rate, it is appropriate to increase the Pay Telephone Charge to allow for recovery of the dial-around costs mandated by the FCC.

A. Commission Jurisdiction to Adopt Pay Telephone Charge

12. MCI argues that, "The FCC has completely occupied the field of payphone rates" (MCI comments, page 6), and, consequently, the Commission has no authority to set any end-user charge relating to IXCs' recovery of the costs for dial-around compensation. According to MCI: Section § 276(b)(1)(A) gives the FCC authority over local coin calls and dial-around calls from payphones. Payphone compensation to PSPs is a payment for use of their payphone, whether the call is interstate or intrastate. And any surcharge to recover the costs of dial-around compensation is an "interstate recovery charge" similar to the subscriber line charge. As such, the states have no authority to regulate carrier surcharges intended to recover the costs for dial-around compensation.

[5] *Report and Order*, paragraph 15.
[6] *Report and Order,* paragraph 1.

13. CPA disputes MCI's arguments. Contrary to MCI's contention, CPA argues, the FCC has not asserted exclusive jurisdiction over end-user surcharges to recover the costs of dial-around compensation. And until the FCC claims exclusive authority in this area, no grounds exist to find state preemption.

14. The ALJ rejects MCI's argument that the Commission has no authority to set a charge intended to allow for recovery of dial-around costs. In essence, MCI argues that federal law confers all power over payphone related issues to the FCC, and that the FCC has preempted all state action in this area. However, MCI cites no legal authority that actually supports its argument. The primary authority mentioned by MCI is § 276(b)(1)(A); yet, that statute only provides that the FCC shall prescribe regulations to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone…." That is, as relevant here, § 276(b)(1)(A) speaks only to the FCC's power to establish dial-around compensation, the payment to be made by IXCs to PSPs. That statute does *not* relate to the charge to be assessed by IXCs upon end-users to recover the costs of dial-around compensation.

15. Federal intent to preempt state action concerning charges for intrastate telephone calls, services traditionally regulated by the states, must be plain and clear. However, discussion in the FCC's *Report and Order* (*e.g.,* footnote 87) indicates that the FCC intends that the states retain authority over some payphone matters. In any event, nothing cited by MCI indicates any federal intent to preempt state authority, much less indicating a plain and clear intent of preemption, over end-user charges for intrastate calls (or services in support of such calls such as a dial-around call associated with an intrastate toll call).

B. The Amended Pay Telephone Charge

16. The Notice of Proposed Rulemaking in this case proposed to increase the Pay Telephone Charge to $.50 to reflect the new dial-around compensation rate of $.494. Noting that the proposed charge is only $.006 per call above the FCC-mandated dial-around rate, MCI, Qwest, and Eschelon all suggest that a $.50 charge is insufficient to allow carriers to recover their cost of administering dial-around compensation.[7] MCI and Qwest both suggest that the benchmark rate should be at least $.55 per call.

17. MCI and Qwest suggest that, in addition to mandating dial-around payments to PSPs of $.494 per call, the FCC has required carriers to establish "expensive" tracking, reporting and auditing procedures to administer dial-around compensation. Each carrier asserts that its own costs for administering the program substantially exceed $.006 per call. In fact, MCI and Qwest argue, even the $.02 per call previously allowed by the Commission for administration costs is inadequate.

18. MCI and Qwest note that the Pay Telephone Charge in effect prior to this docket and the emergency rule was $.26 per call, when the FCC-mandated dial-around rate was only $.24. Therefore, according to the comments, when the dial-around compensation rate was $.24 per call, the Commission recognized, for cost recovery purposes, average carriers' administrative costs of $.02 per call. MCI and Qwest point out that the primary reason for the FCC-mandated

[7] The comments characterize the benchmark Pay Telephone Charge as a rate "cap." However, as discussed in this Order, that characterization is inaccurate. Rule 5.4.4 of the Operator Service Rules specifically allows for rates in excess of the benchmarks provided the carrier proves those rates are just and reasonable.

increase in the dial-around rate was the substantial decrease in the volume of dial-around calls.[8]

Qwest (comments at page 2) then concludes:

> The average call volumes at marginal payphone locations has declined by 60% between the time that the FCC's default rate of $.24 was established and the establishment of the current default rate of $.494. Given this decline in average call volumes, the additional costs associated with payphone compensation under the Commission's current rate cap should increase from $.02 to $.05 because those costs would be spread over 60% fewer calls. These additional costs would require an increase in the minimum surcharge rate to $.544, assuming that there were no other changes in carriers' costs in the interim. (footnote omitted)

MCI agrees with this reasoning.

19. CPA supports the proposed $.50 Pay Telephone Charge. According to CPA, carriers should pass onto their customers only the amount of the per call dial-around compensation rate, plus a small increment for tracking, collection and administrative purposes.

20. For the reasons stated here, the ALJ rejects MCI's and Qwest's suggestion that the Pay Telephone Charge should be set at $.55 per call. First, the assertions that their individual administrative costs require this rate are unsupported by any tangible, material information such as a cost study. The policy underlying Rule 5.4.4 of the Operator Service Rules (rates above the benchmark must be supported by cost studies) implies that MCI's and Qwest's assertions should have been confirmed by specific cost information. No such information was provided. Indeed, MCI's and Qwest's assertions regarding their individual costs remained general and vague; not